



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2018-0105; Notice 2]

BMW of North America, LLC, Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition.

SUMMARY: BMW of North America, LLC (BMW), a subsidiary of BMW AG, has determined that certain model year (MY) 2019 BMW F750 GS and F850 GS motorcycles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 205, *Glazing Materials*. BMW filed a noncompliance report dated October 19, 2018. BMW subsequently petitioned NHTSA on October 29, 2018, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces the grant of BMW's petition.

FOR FURTHER INFORMATION CONTACT: Leroy Angeles, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-5304, Leroy.Angeles@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Overview:

BMW has determined that certain MY 2019 BMW F750 GS and F850 GS motorcycles do not fully comply with paragraph S6.3 of FMVSS No. 205, *Glazing Materials* (49 CFR 571.205). BMW filed a noncompliance report dated October 19, 2018, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. BMW subsequently petitioned NHTSA on October 29, 2018, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to

motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556,

Exemption for Inconsequential Defect or Noncompliance.

Notice of receipt of BMW's petition was published with a 30-day public comment period, on February 27, 2020, in the **Federal Register** (85 FR 11447). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2018-0105."

II. Vehicles Involved:

Approximately 604 MY 2019 BMW F750 GS and F850 GS motorcycles, manufactured between June 21, 2018, and September 19, 2018, are potentially involved.

III. Noncompliance:

BMW explains that the noncompliance is that the subject motorcycles are equipped with windscreens that do not comply with paragraph S6.3 of FMVSS No. 205. Specifically, the subject windscreens were marked with the AS4 glazing type marking instead of the AS6 glazing type marking. The windscreens were AS6 glazing and should have been marked as the AS6 glazing type.

IV. Rule Requirements:

Paragraph S6.3 of FMVSS No. 205 includes the requirements relevant to this petition. A manufacturer or distributor who cuts a section of glazing material to which this standard applies, for use in a motor vehicle or camper, must mark that material in accordance with section 7 of ANSI/SAE Z26.1–1996 and certify that its product complies with this standard in accordance with 49 U.S.C. 30115.

AS4 certified glazing is typically rigid plastic and is only permitted for use in certain locations. AS4 glazing may not be used for motorcycle windscreens. AS4 glazing is not subject to a flexibility test, whereas AS6 marked glazing is subject to this test. AS6 certified glazing is typically made of flexible plastic and, unlike AS4 certified glazing, can be used as a motorcycle

windscreen. Additionally, AS6 certified glazing is not subject to two impact tests, an abrasion test, and a dimensional stability test, whereas, AS4 certified glazing is subject to these tests.

V. Summary of BMW's Petition:

BMW described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety. The following views and arguments presented in this section "V. Summary of BMW's Petition," are the views and arguments provided by BMW.

In support of its petition, BMW submitted the following reasoning:

1. FMVSS No. 205 Section 2 (Purpose) states, "The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions."
2. Potentially affected vehicles conform to all of the FMVSS No. 205 performance requirements. Therefore, they satisfy the stated purpose of FMVSS No. 205 regarding a) injury reduction, and b) rider visibility.
3. Potentially affected vehicles conform to all the FMVSS No. 205 performance requirements. Therefore, there are no safety performance implications associated with this potential noncompliance.
4. BMW has not received any contacts from vehicle owners regarding this issue. Therefore, BMW is unaware of any vehicle owners that have encountered this issue.
5. BMW is unaware of any accidents or injuries that may have occurred as a result of this issue.
6. NHTSA has previously granted petitions for inconsequential noncompliance regarding FMVSS No. 205 involving marking of window glazing. BMW believes that its petition is similar to other manufacturers' petitions in which NHTSA has granted. Examples of similar petitions, in which NHTSA has granted, include the following:

- Ford Motor Company, 80 FR 11259 (March 2, 2015).
- Ford Motor Company, 78 FR 32531 (May 30, 2013).
- Ford Motor Company, 64 FR 70115 (December 15, 1999).
- General Motors, LLC, 79 FR 23402 (September 25, 2015).
- General Motors, LLC, 70 FR 49973 (August 25, 2005).
- Toyota Motor North America Inc., 68 FR 10307 (March 4, 2003).
- Fuji Heavy Industries USA, Inc., 78 FR 59088 (September 25, 2013).
- Mitsubishi Motors North America, Inc., 80 FR 72482 (August 22, 2015).
- Pilkington North America, Inc., 78 FR 22942 (April 17, 2003).
- Supreme Corporation, 81 FR 72850 (October 21, 2016).
- Custom Glass Solutions Upper Sandusky Corp., 80 FR 3737 (January 23, 2015).

7. Vehicle production has been corrected to conform to FMVSS No. 205 S6.

8. BMW also provided a copy of the FMVSS No. 205 Certification Report from AIB-Vincotte International N.V.

VII. NHTSA's Analysis:

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement with no performance implications*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.¹ Potential performance failures of safety-critical equipment are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality is the safety risk to individuals who experience the type of event against which the recall would otherwise protect.²

¹ Cf. *Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

² See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 46000 (July 30, 2013) (finding

In general, NHTSA does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety. “Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.”³ “[T]he fact that in past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.”⁴

NHTSA has evaluated the merits of BMW’s petition for inconsequential noncompliance. The purpose of FMVSS No. 205 is to reduce injuries resulting from impact to glazing surfaces to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions.

The subject vehicles in BMW’s petition have noncompliances that pertain to motorcycle windscreens that have incorrect AS markings. The Agency believes that it is important that the motorcycle windscreens equipped in the subject motorcycles are compliant with both FMVSS No. 205 performance and labeling requirements. Nonetheless, BMW’s petition establishes that the incorrectly marked windscreens on the affected motorcycles conform to all FMVSS No. 205 performance requirements as evidenced in a test report showing the windscreens meet all the AS6 glazing performance requirements required by FMVSS No. 205.

As the performance requirements are met, NHTSA’s principal concern is whether the noncompliant marking of the windscreen creates a safety risk in the event that consumers mistakenly believe the glazing meets the impact, abrasion, and dimensional stability requirements of AS4 glazing or attempt to replace the windscreen with AS4 glazing.

First, NHTSA considered whether the mismarking would lead a consumer to believe that the windscreen offers the same level of performance provided by AS4 glazing that is not

occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

³ *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016).

⁴ *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it “results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future”).

provided by AS6 glazing material. Specifically, NHTSA considered whether a rider would believe that, as a result of the mismarking, the windscreen provides impact protection and meets dimensional stability and abrasion requirements. While this could be a potential safety risk, the size and placement of the subject windscreen was factored into NHTSA's analysis. The windscreens come in two sizes, one measuring 316 mm wide by 309 mm high, and the other measuring 314 mm wide by 216 mm high. The size, design, and placement of the subject windscreens appear such that a rider would expect that they would offer little to no impact protection. Further, the size and placement of the windscreens are such NHTSA does not believe that the mismarking will create a safety risk from riders believing that the windscreen meets the abrasion and dimensional stability requirements of AS4 glazing. According to BMW, the subject windscreens are intended to protect the dashboard electronics, deflect wind away from the rider, and serve as an aesthetic design for the motorcycle. Further, NHTSA believes that few riders know the differences in performance of AS4 and AS6 glazing. NHTSA believes that due to the size, design, placement of the subject windscreens, and the likelihood that riders would know the differences between the performance of AS4 and AS6 glazing, riders are unlikely to believe that the windscreen offers a higher level of performance than actually offered by the noncompliant windscreens.

Second, in the case that the windscreens require replacement, NHTSA believes that there is minimal risk in a motorcyclist being misled by the improper marking and concluding that a replacement windscreen must be of AS4 glazing rather than AS6 flexible glazing. The Agency believes that this risk is minimal because an AS4 replacement part would not be available and obtaining such a part would require that the new windscreen be custom fabricated from rigid AS4 glazing. If such fabrication were possible, it would likely entail considerable inconvenience and expense. Further, BMW or another replacement part supplier would be able to easily identify the correct AS6 replacement glazing through their replacement parts identification systems.

BMW's petition also cited multiple instances where NHTSA previously determined that incorrect AS markings on glazing were inconsequential for safety. The Agency first notes that use of previous determinations for inconsequential noncompliance should be viewed with caution as each inconsequential noncompliance petition is evaluated on the individual facts presented and determinations are made on a case-by-case basis. Further, of the eleven cited petitions, only 2 pertained to glazing that contained an incorrect AS glazing type marking and are potentially relevant to this petition. In both the petition from General Motors, LLC, (79 FR 23402, September 25, 2015) and the petition from Mitsubishi Motors North America, Inc. (80 FR 72482, August 22, 2015), AS3 glazing was marked as AS2 glazing. While the petitions are similar to BMW's, AS3 glazing and AS2 glazing have the same impact protection requirements. The analysis for this petition is different because, as discussed above, AS4 glazing is required to meet two impact tests that are not required for AS6 glazing.

Given that the windscreens in the subject motorcycles meet all the performance requirements as required by FMVSS No. 205 and the improper marking of the glazing presents no recognizable safety risk, the Agency finds that the subject glazing is inconsequential to motor vehicle safety.

VII. NHTSA's Decision:

In consideration of the foregoing, NHTSA finds that BMW has met its burden of persuasion that the subject FMVSS No. 205 noncompliance in the affected vehicles is inconsequential to motor vehicle safety. Accordingly, BMW's petition is hereby granted. BMW is consequently exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or

noncompliance. Therefore, this decision only applies to the subject vehicles that BMW no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after BMW notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

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